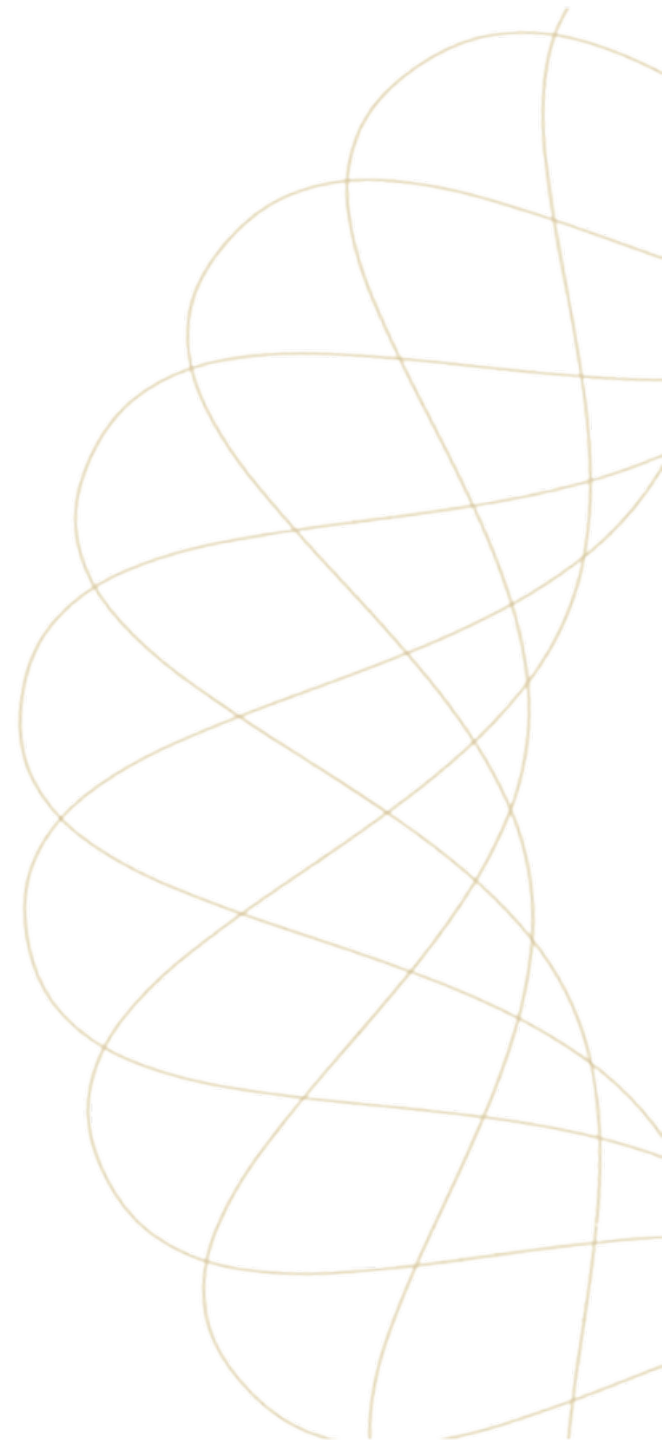


Outer Temple

Travel Law Conference

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Force Majeure and Package Travel

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Coming Up...

- What is 'force majeure'?
- Relevant Provisions -PTLAR 2018
- Domestic Case Law
- CJEU Case Law

What is 'Force Majeure'?

- 'The expression "force majeure clause" is normally used to describe a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events, typically, but not necessarily, an event or events beyond its control' - *Chitty on Contracts, 35th Edition at 27-060*
- As far as English law is concerned the words "force majeure" do not amount to a term of art (*Lebeaupin v Crispin & Co* [1920] 2 K.B. 714, 719).



Relevant Provisions

- **Price Reductions and Compensation for Damage**
 - *Reg 16(2) – (4)*
 - *Reg 16(6)(a)*
- **Refunds**
 - *Reg 11*
 - *Reg 12(7)-(8)*
 - *Reg 13(1)-(3)*
 - *Reg 14*
- **Definitions**
 - *Reg 2*

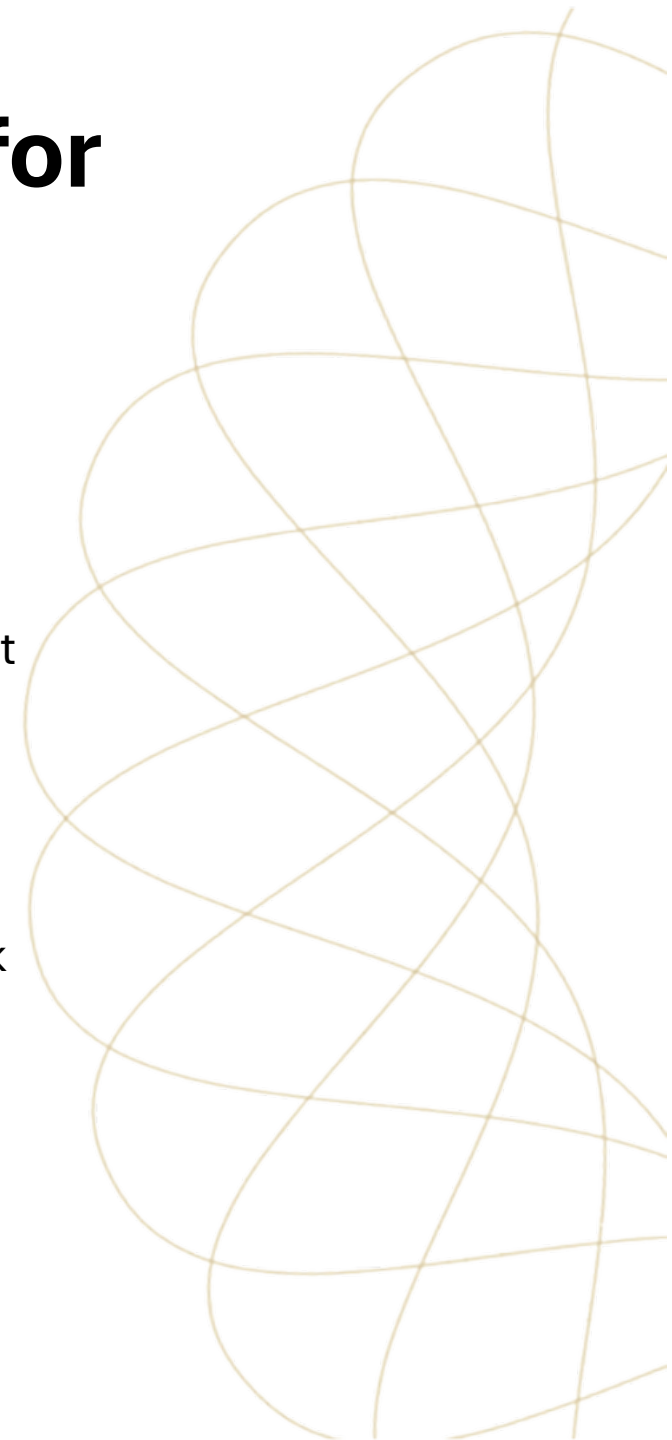


Price Reductions and Compensation for Damage

Regulation 16

‘(2) The organiser must offer the traveller an appropriate price reduction for any period during which there is a lack of conformity, unless the organiser proves that the lack of conformity is attributable to the traveller.

(3) The organiser must offer the traveller, without undue delay, appropriate compensation for any damage which the traveller sustains as a result of any lack of conformity.’



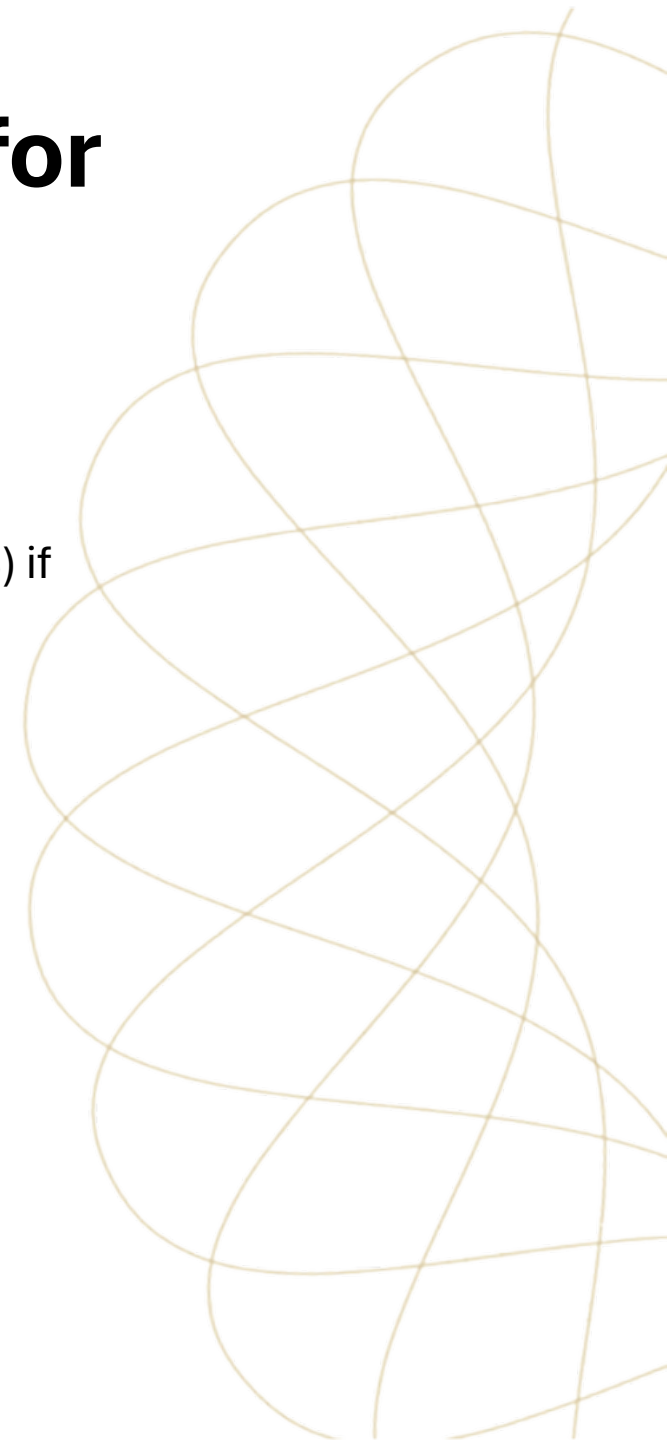
Price Reductions and Compensation for Damage

Regulation 16...

‘(4) The traveller is not entitled to compensation for damages under paragraph (3) if the organiser proves that the lack of conformity is—

- (a) attributable to the traveller;
- (b) attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or
- (c) due to **unavoidable and extraordinary circumstances.**’

Regulation 16(6)(a) prohibits the organiser from limiting liability for personal injury beyond the scope of 16(4).



Refunds (1)

Regulation 11

‘(3) Paragraphs (4) to (11) apply where, before the start of the package, the organiser—

(a) is constrained by circumstances beyond the control of the organiser to alter significantly any of the main characteristics of the travel services specified in paragraphs 1 to 10 of Schedule 1;

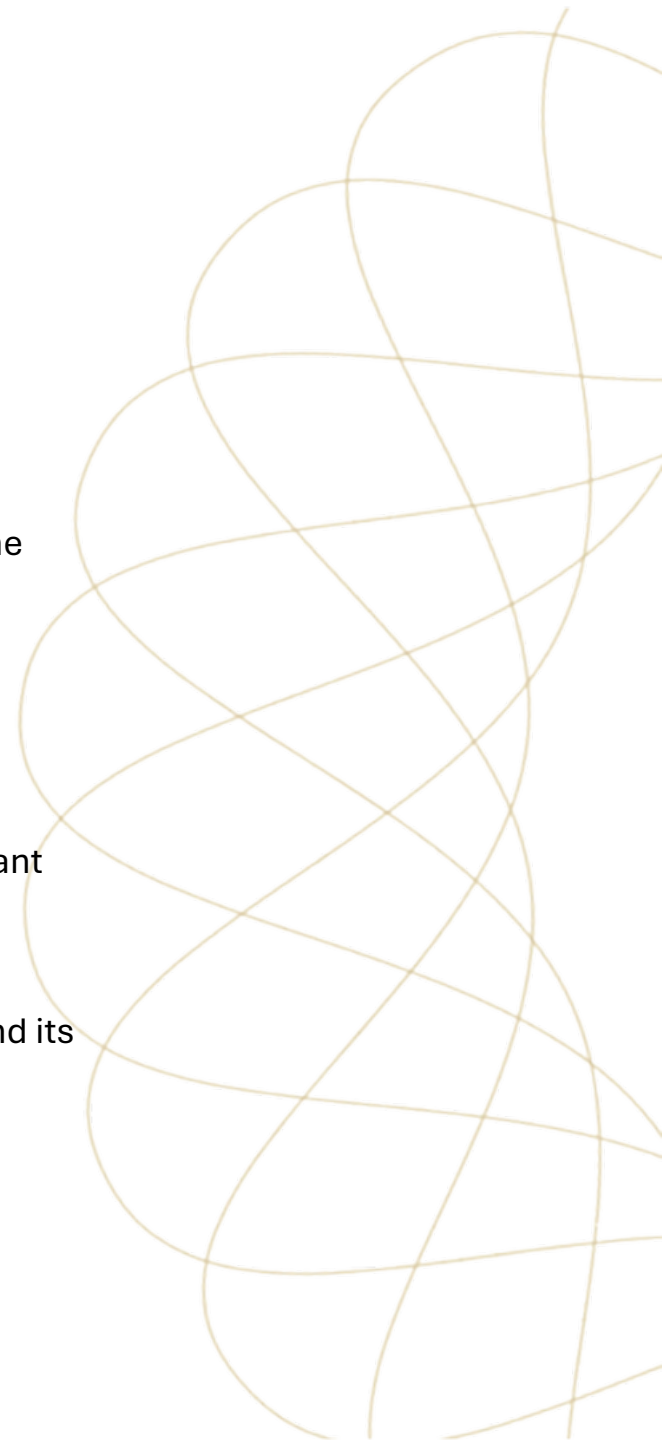
...’

(4) The organiser must, without undue delay, inform the traveller in a clear, comprehensible and prominent manner durable medium, of—

- (a) the proposed changes referred to in paragraph (3) and, where appropriate...their impact on the price of the package;
- (b) a reasonable period within which the traveller must inform the organiser of the decision pursuant to paragraph (5);
- (c) the consequences of the traveller’s failure to respond within the period referred to in sub-paragraph (b); and
- (d) any substitute package, of an equivalent or higher quality, if possible, offered to the traveller and its price.

(5) The traveller may, within a reasonable period specified by the organiser—

- (a) accept the proposed changes; or
- (b) terminate the contract without paying a termination fee.’



Refunds (2)

Regulation 12

‘(7)...in the event of **unavoidable and extraordinary circumstances** occurring at the place of destination or its immediate vicinity and which significantly affect—

- (a) the performance of the package, or
- (b) the carriage of passengers to the destination,

the traveller may terminate the package travel contract before the start of the package without paying any termination fee.

(8) Where the package travel contract is terminated under paragraph (7), the traveller is entitled to a full refund of any payments made for the package but is not entitled to additional compensation.’



Refunds (3)

Regulation 13

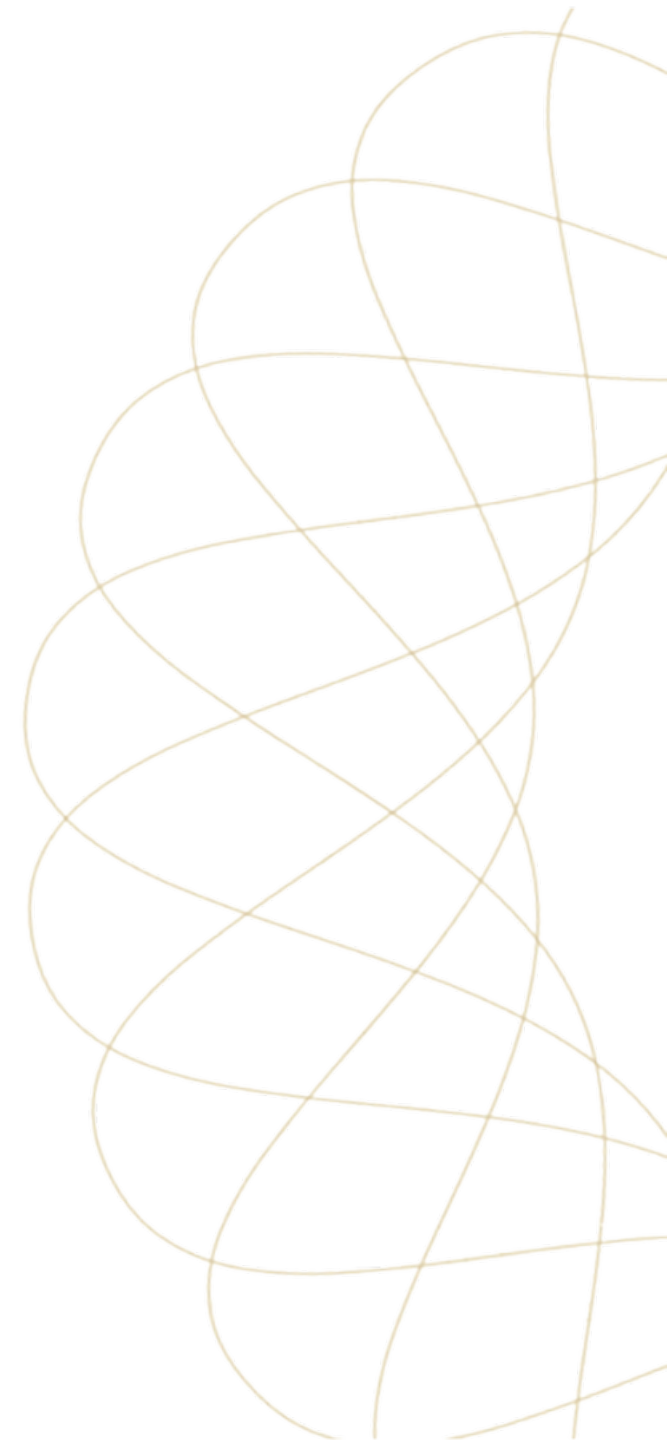
‘(1) The provisions of this regulation are implied as a term in every package travel contract.

(2) Paragraph (3) applies where—

(a) the number of persons enrolled for the package is smaller than the minimum number stated in the contract and the organiser notifies the traveller of the termination of the contract within the period fixed in the contract but not later than—

- (i) in the case of trips lasting more than 6 days, 20 days before the start of the package;
- (ii) in the case of trips lasting between 2 and 6 days, 7 days before the start of the package;
- (iii) in the case of trips lasting less than 2 days, 48 hours before the start of the package; or

(b) the organiser is prevented from performing the contract because of **unavoidable and extraordinary circumstances** and notifies the traveller of the termination of the contract without undue delay before the start of the package.



Refunds (4)

Regulation 13...

(3) The organiser—

(a) may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package;

(b) is not liable for additional compensation.'

Regulation 14

Regulation 14(3) provides that any refund required pursuant to regulation 12(8) or 13(3) (above) 'must be made to the traveller without undue delay and in any event not later than 14 days after the package travel contract is terminated.'



What are ‘unavoidable and extraordinary circumstances’? (1)

Regulation 2(1) defines “**unavoidable and extraordinary circumstances**” as a situation:

‘(a) beyond the control of the party who seeks to rely on such a situation for the purpose of regulation 12(7), 13(2)(b), 15(14) or (16), 16(4)(c) or 28(3)(b); and

(b) the consequences of which could not have been avoided even if all reasonable measures had been taken.’



What are 'unavoidable and extraordinary circumstances'? (2)

Recital 31 of the 2015 Directive

'Travellers should also be able to terminate the package travel contract at any time before the start of the package in return for payment of an appropriate and justifiable termination fee, taking into account expected cost savings and income from alternative deployment of the travel services. They should also have the right to terminate the package travel contract without paying any termination fee where unavoidable and extraordinary circumstances **will** significantly affect the performance of the package. This may cover for example **warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions** which make it impossible to travel safely to the destination as agreed in the package travel contract.'



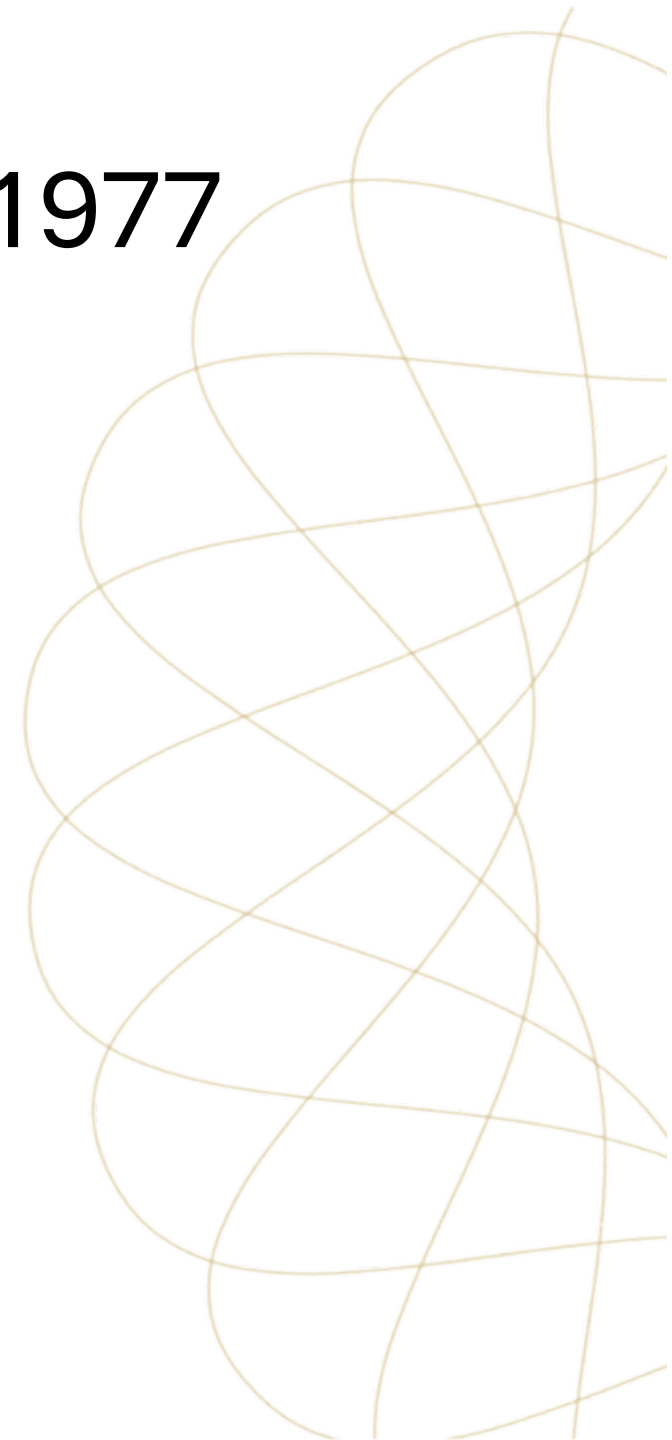
Domestic Case Law – A Case Study

- The COVID-19 Pandemic.
- Cancellations and curtailment.
- Significant for travellers, Tour Operators and Insurers.



Lambert v Travelsphere [2005] CLY 1977

- Outbreak of the SARS pandemic in China and Hong Kong in 2003.
- The Lamberts took it upon themselves to cancel the holiday due to the potential risk of contracting SARS.
- The “flicker of hope” test.
- Held: the Claimant was not entitled to a refund.



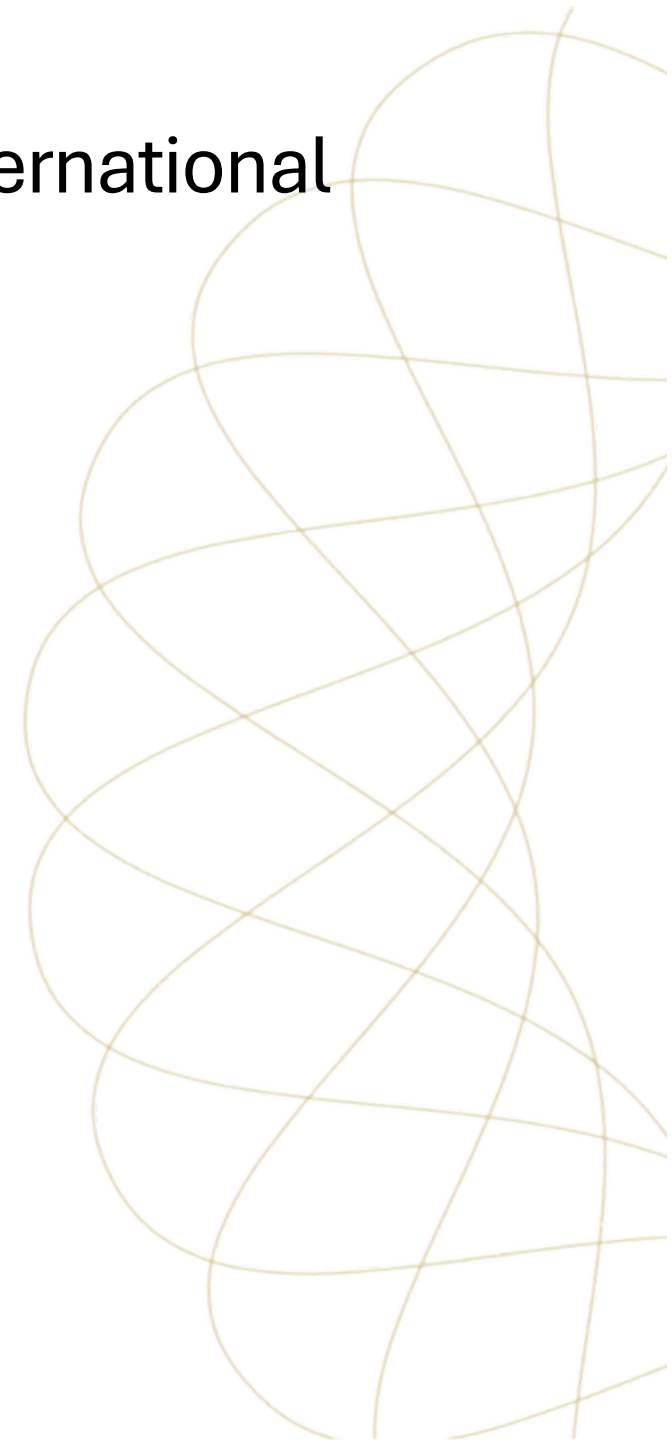
Regulation 12(7) in practice

- Nick Braithwaite v Loveholidays
 - Holiday cancelled 2 days before departure due to FCDO advice.
 - Mr Braithwaite sought a refund for the cancellation.
 - Held: FCDO advice did amount to unavoidable and extraordinary circumstances.



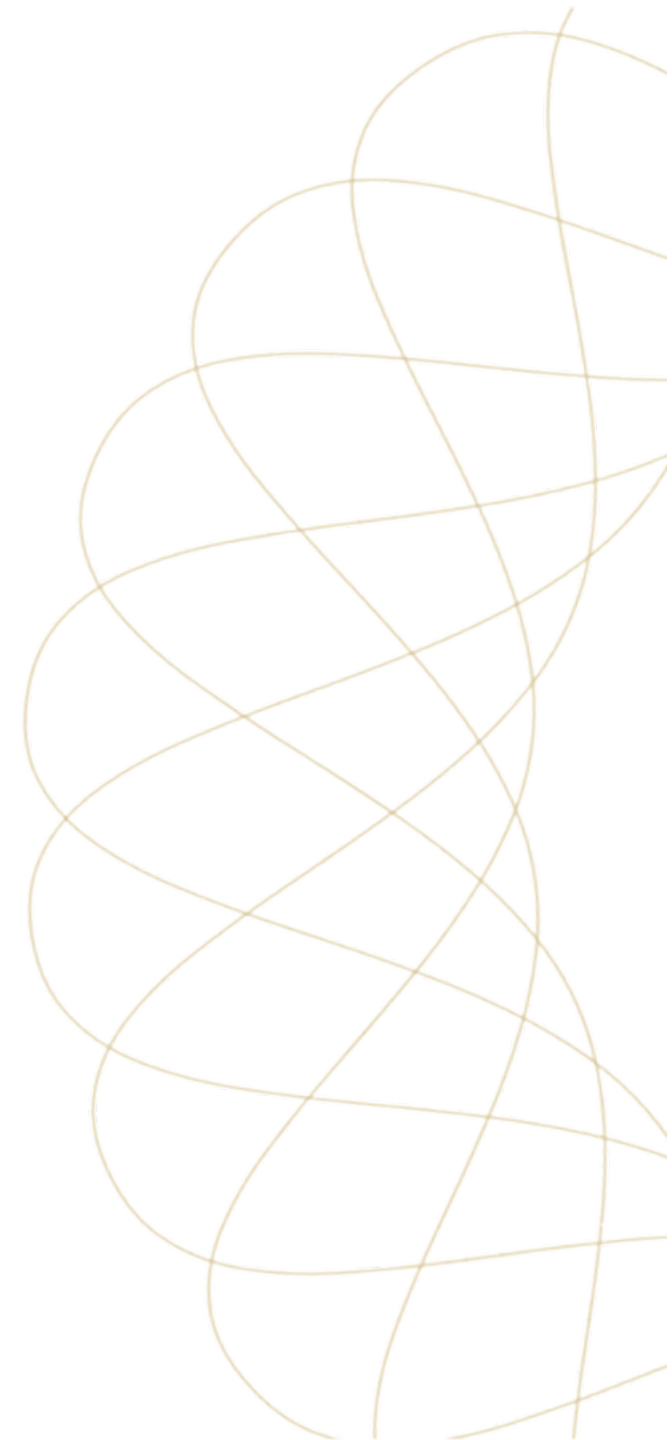
Brynmawr Foundation School v Holiday World International Travel Limited (t/a Leisure World Schools)

- The Claimant school had booked a school skiing trip to the USA. Due to depart on 02/04/20.
- The school cancelled on the 30/03/20 and sought a refund.
- Held: the Claimant was entitled to a refund as it was clear that the trip and carriage of passengers were significantly affected both in the UK and in the USA.



Hannah Dennison v Loveholidays

- The Claimant had booked a package holiday which was due to take place during the pandemic.
- At that time, there was a requirement to quarantine on re-entry to the UK for a number of weeks.
- The Claimant cancelled the holiday and sought a refund.
- Held: The Claimant was not entitled to a refund.



Other examples?

- Package holiday and cruise to Canada in June 2020. The cruise was cancelled but the package holiday went ahead. C sought a refund which D denied. However, Canada did not permit foreign nationals into the country.
- C was advised by his GP that he would be particularly susceptible to becoming ill if he contracted coronavirus so cancelled his holiday to Greece four months before it was due to take place.
- C's holiday was curtailed by approximately 50% because he and his family were required to fly back home due to COVID.
- Skiing holiday cancelled by Tour Operator but 100% cancellation charged on basis of costs already incurred.



Sherman v Reader Offers Ltd [2023] EWHC 524 (KB)

- C booked a North West Passage Cruise with D. This was over the telephone and a detailed itinerary was provided later.
- In advance of the cruise, the route was significantly changed because of a sea ice block which did not break up when expected.
- C pursued a refund based on the detailed itinerary.
- Held: the itinerary (even though provided after booking) was a significant term of the contract between C and D. The change of route was tantamount to a significant alteration.
- Change in test from “flicker of hope” to “reasonable possibility”?
- Appeal



ECJ Case Law - Price Reductions

C-396/21 KT, NS v FTI Touristik GmbH (1)

- Travellers from Germany had contracted for a two-week holiday in the Canaries to take place in March 2020.
- Due to the Covid pandemic, two days after they arrived the beaches were closed and a curfew was imposed. At the hotel, could only leave their rooms to eat or get a drink. The travellers had to return home after seven days.
- The German travellers claimed for a 70% price reduction under German legislation implementing the 2015 Directive on the basis that their holiday was not in conformity with the contract.
- The holiday organiser denied the claim for a price reduction on the basis that it could not be liable for what was a “general life risk”.



ECJ Case Law - Price Reductions

C-396/21 KT, NS v FTI Touristik GmbH (2)

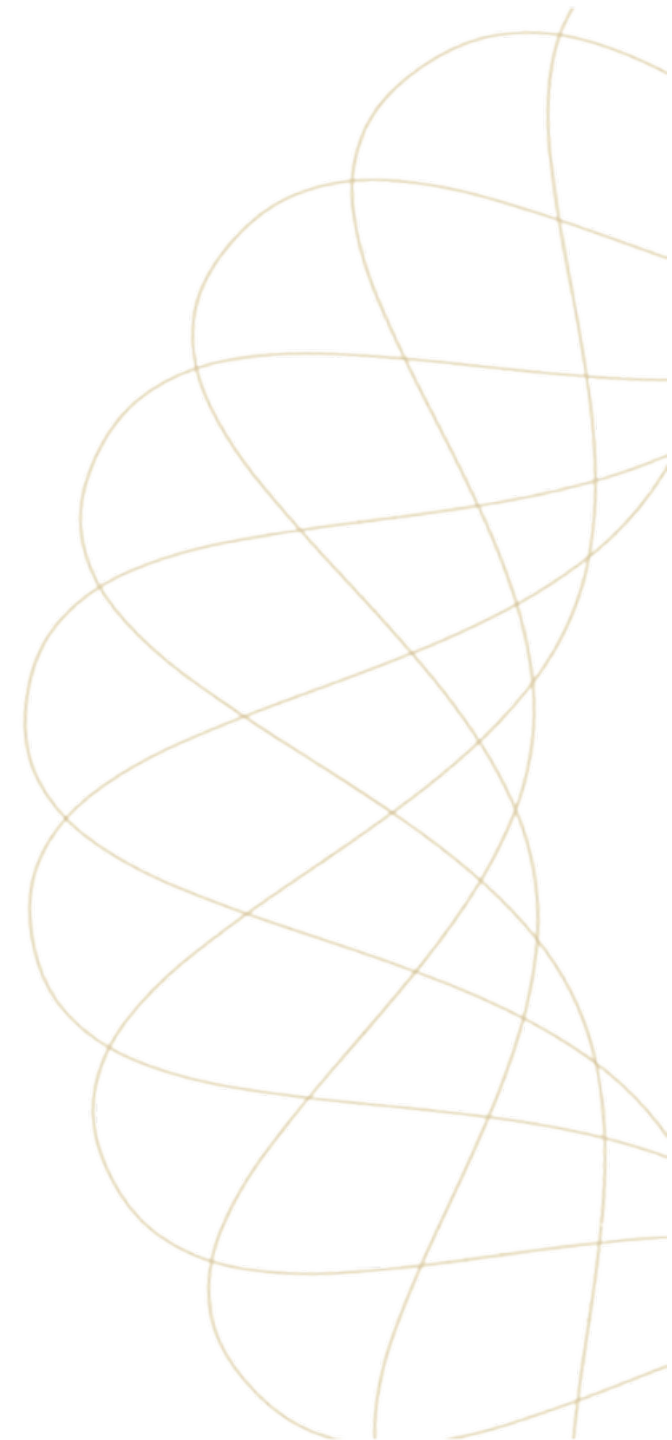
- At first instance, the German courts dismissed the action on the ground that measures taken to protect the health of travellers due to a deadly virus did not qualify as a relevant lack of conformity.
- On appeal, the referring court noted that it might be possible to classify the measures adopted by the Spanish authorities not as exceptional circumstances in the travel destination but as normal measures taken throughout Europe in response to the pandemic.



ECJ Case Law - Price Reductions

C-396/21 KT, NS v FTI Touristik GmbH (3)

- The Court held that:
 - Art.14(1) of the Directive (*implemented in the UK by reg.16(2) of the PTLAR 2018*) gave travellers a right to an appropriate price reduction where there is a lack of conformity - the cause of the lack of conformity is irrelevant to that entitlement;
 - “*the finding of a lack of conformity is objective in that it requires only a comparison between the services included in the package of the traveller concerned and those in fact provided to that person*”; and
 - The “*sole exception*” to the organiser’s liability for a price reduction in the case of non-conformity is where it is attributable to the traveller, and that exception should be given a “*strict interpretation*”.



ECJ Case Law - Price Reductions

C-396/21 KT, NS v FTI Touristik GmbH (3)

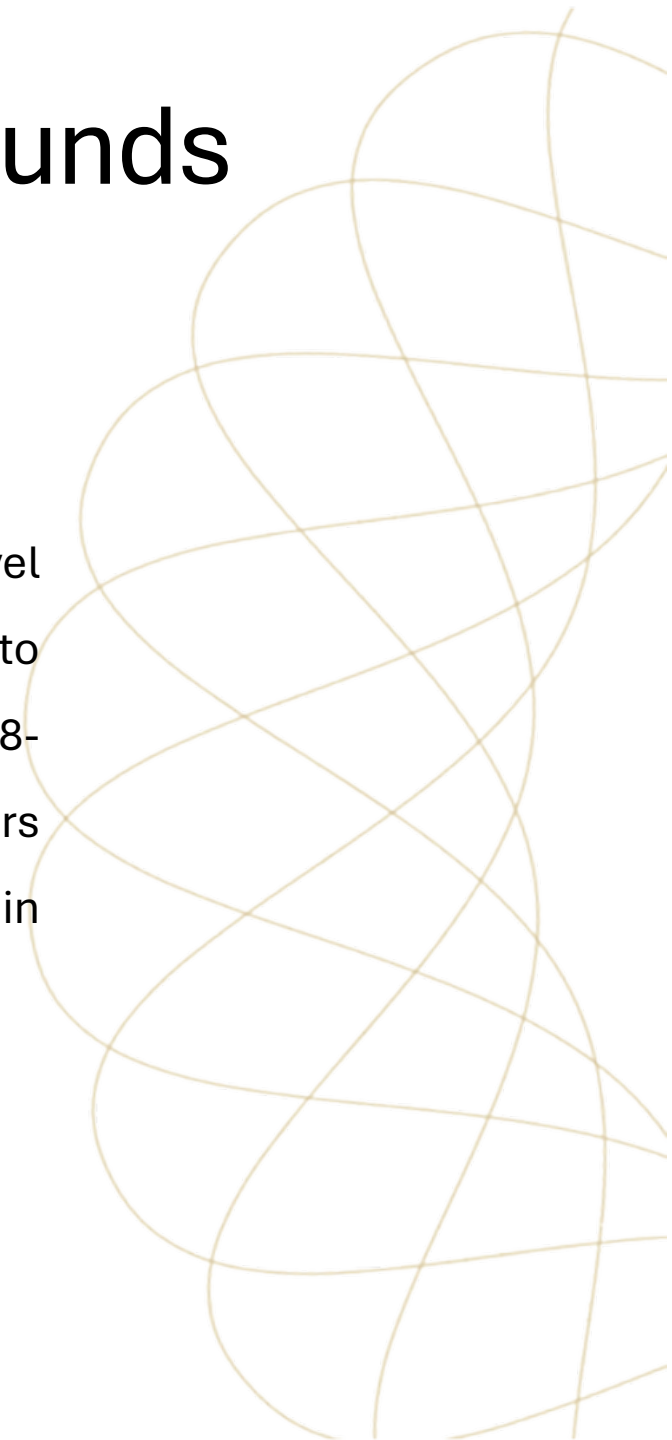
Article 14(1) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, must be interpreted as meaning that a traveller is entitled to a reduction in the price of his or her package holiday where a lack of conformity of the travel services included in the package is due to restrictions that have been imposed at the travel destination to fight the spread of an infectious disease and such restrictions have also been imposed in the traveller's place of residence and in other countries due to the worldwide spread of that disease. In order for that price reduction to be appropriate, it must be assessed in the light of the services included in the package concerned and must correspond to the value of the services for which a lack of conformity has been found.



ECJ Case Law - Termination and Refunds

Case C-407/21 UFC – Que choisir and CLCV

- During the COVID-19 pandemic, France adopted legislation to enable travel organisers, in the event of termination of a package travel contract owing to unavoidable and extraordinary circumstances, to issue a voucher with an 18-month validity period giving rise to a refund of any payments made by travellers only if that voucher is not used during that period (instead of a full refund within 14 days, as stipulated by the Directive).
- This measure was intended to protect the solvency of travel organisers.



ECJ Case Law - Termination and Refunds

Case C-407/21 UFC – Que choisir and CLCV

- In its judgment, the Court held that Member States cannot invoke force majeure in order to release, even temporarily, package travel organisers from the reimbursement obligation laid down by the Directive. The refund provided for in the Directive is to be understood as a reimbursement in the form of money. The EU legislature did not envisage the possibility of replacing that payment obligation with a benefit in another form, such as the offer of vouchers. A refund is better able to contribute to the protection of the travellers' interest.
- The Court rejected the French Government's argument that the COVID-19 pandemic, while constituting 'unavoidable and extraordinary circumstances' pursuant to the Directive (in respect of which a refund is prescribed), also constituted a case of force majeure, covering cases which go beyond what was envisaged when the Directive was adopted and permitting the adoption of national legislation derogating from the obligation to provide a full refund.
- The CJEU held that concept of 'unavoidable and extraordinary circumstances' constitutes, for the purposes of the Directive, an exhaustive implementation of force majeure.
- Consider ***CMA v Truly Holdings*** [2022] EWHC 386 (Ch)





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Thank you

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